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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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September 15, 1958.

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REPLY BRIEF FOR PETITIONER.

The brief for the United States in opposition to this petition avoids and does not meet the principal points urged by Petitioner.

We respectfully submit that it remains clear that the court below has decided important questions of federal law which this Court has not decided but should settle; that the court below decided other important federal questions contrary to established decisions of this Court; and that the court below has so far sanctioned a departure from the accepted course of judical proceedings as to call for an exercise of this Court's power of supervision.

The Facts.

Petitioner points out a few areas wherein the Court could be misled by the facts as stated in the Government's brief.

1. The Articles Seized.

In discussing the "propriety of the seizures" in Petitioner's hotel room when he was taken into custody for deportation on June 21, 1957 the Government brief creates the impression that I. N. S. agents there discovered four items relating to alienage and that these items, plus one other, were the only items then seized by I. N. S. agents which were used in the espionage case. This impression can mislead the Court, as it did the court below ("Opinion of Court," Our Brief, Appendix A, p. 41).

The I. N. S. agents conducted only a "superficial examination" of Abel's personal effects at the time of the arrest (103).* They seized all his possessions, over 200 items (37-46, 68), and took them to I. N. S. headquarters (69). See *Kremen* v. *United States*, 353 U. S. 346 (1957).

At I. N. S. headquarters a thorough search of the 200 items was conducted by the F. B. I. and I. N. S. (48, 54, 60) and it was then that 1) the Emil Goldfus birth certificate, 2) the international certificate of vaccination, and 3) the East River Savings Bank book were discovered to be among the over 200 items seized (668-669). The F. B. I. agents also found and used from among the 200 items at least another 10, in no way connected with alienage, to obtain a search warrant a week later (48-59). Based on this search warrant, the F. B. I. obtained at least 9 exhibits and the testimony of two witnesses for use at the trial (Our Petition, Appendix "D", p. 62).

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* Unless otherwise indicated, parenthetical page references are to the separately printed Joint Appendix in the court below.

In addition, the F. B. I. used other items seized and unrelated to alienage, such as "3 Bills from Broadway Central and 3 Bills from Datona Plaza" (45), to procure evidence used at the trial (636, 635-6, 713-4). In all, the seizure of all Petitioner's possessions and the subsequent search of them resulted in at least 35 exhibits and the testimony of 7 witnesses at the trial. (See Petition, Appendix "D".)

2. "Good Faith" of the Department of Justice.

In discussing the "good faith" of the Department of Justice in making the search at the Hotel Latham, the Government brief has minimized the role played by the F. B. I. This should be irrelevant, of course, since I. N. S. and the F. B. I. are both component parts of the Department of Justice, subject to the Attorney General. (See Reorganization Plan No. 2 of 1950, 15 F. R. 3173, 64 Stat. 1261.) However, the facts should be correctly presented to the Court.

To minimize the F. B. I. role, the Government has had to rely heavily on the testimony of an I. N. S. official named Noto (Their Brief, pp. 4, 5). The record shows that Mr. Noto unfortunately could not recall many events that happened during June, 1957, as is readily apparent from the testimony of the other Government agents and the report of an interview with General Swing. He did recall, however, being told by the F. B. I. that Petitioner's true name was Abel (201, 204) well before the F. B. I. agents or anyone else investigating the case discovered such to be the fact or ever heard of the name (174, 289, 56, 57).

Some of the facts concerning the F. B. I. participation in Petitioner's detention, which the Government brief omitted, are as follows:

On June 19, 1957 at 3:00 or 4:00 o'clock in the afternoon, three I. N. S. officials met with four F. B. I. agents at the F. B. I. headquarters in Washington (158-160). During the two hours they were there, the I. N. S. agents were given an F. B. I. report and were instructed to and did prepare an Immigration detention warrant, take it to New York and call F. B. I. headquarters there (96, 124-5, 132, 161-5).

Around midnight that night four I. N. S. agents met with eight F. B. I. agents at F. B. I. headquarters in New York, having with them the warrant which had been signed as a matter of form by the I. N. S. District Director in New York (97-99, 134). The I. N. S. agents spent the night at F. B. I. headquarters and proceeded in the morning in F. B. I. cars to the Petitioner's hotel, where six F. B. I. agents were waiting for them (100-101, 137).

Three F. B. I. agents entered Petitioner's hotel room about 7:00 A. M., July 21, 1957 (175-177). Their instructions were to solicit his cooperation (175). If he did cooperate they were to call their F. B. I. superior (184-5). If he did not, they were to direct the I. N. S. agents to arrest him (185). The F. B. I. agents informed Petitioner that his arrest was contingent on whether or not he cooperated (183-5, 188). The I. N. S. agents had agreed with the F. B. I. to arrest Petitioner only if he did not cooperate with the F. B. I. (191).

The F. B. I. agents signalled the I. N. S. agents to proceed with the arrest (138, 190). The F. B. I. remained present, procured the hotel bill and paid the bill (69, 144-146, 190, 703). F. B. I. agents conducted their own search and seizure after Petitioner was removed from the hotel and later examined all the items I. N. S. had seized there (48, 54, 70, 694). They used a large number of the items seized by I. N. S. to build their espionage case. (See "1" above.) Two of the F. B. I. agents then flew to an isolated

detention center in Texas (to which I. N. S. was deporting Petitioner) and immediately resumed soliciting his cooperation (30, 60).

Counter-Espionage.

The Government asserts that the trial court found that no effort had been made to enlist Petitioner in counter-espionage (Govt. Brief, p. 16). Actually Judge Byers stated only that F. B. I. agent Blasco's testimony did not indicate that such an effort had been made (244). But see Pages 175, 183, 191.

The only evidence on this point, in addition to the unique circumstances surrounding Petitioner's detention and subsequent deportation to Texas, comes from two sources: a) the Petitioner and b) F. B. I. agent Blasco. The Petitioner swore in his original affidavit that in addition to soliciting his cooperation in New York, while in Texas "They [the F. B. I.] stated over and over again that [if I would cooperate] they would get me good food, liquor, an air-conditioned room in a Texas hotel, and that they could assure me a job eventually with another Government agency." (31) This statement has never been denied, refuted or indeed mentioned by the Government. Apparently, like the F. B. I.'s explanation of its regular "clandestine" searches (Petition, pp. 13-15), the least embarrassing way for the Government to deal with it lies in ignoring its existence.

3. Petitioner's "Voluntary" Acts.

The Government blandly states that Petitioner "voluntarily checked out of the hotel room" and "abandoned" items he threw in the wastepaper basket (Their Brief, p. 19). We simply point out that these so-called voluntary acts were performed while Petitioner, surrounded by armed

Government agents and "under arrest," was being made ready for removal in handcuffs from the hotel by a rear door, for a special flight with guards to a remote cell in Texas. (See 119.)

4. Testimony of Sergeant Rhodes.

The Court will note that neither the Circuit Court in its opinion, nor the Government in its present brief, has attempted to support the admission of Sergeant Rhodes' testimony by the citation of legal precedent or other authority. The conclusion is inescapable that the admission of such irrelevant and prejudicial testimony has never been sanctioned by a decision of this Court or indeed by any other court of last resort.

To permit the decision below to remain a rule of evidence in federal conspiracy cases, is to condone a substantial erosion of the basic concepts of proper evidence under Anglo-Saxon law.

Conclusion.

The points made in our petition are valid and remain unshaken. This case presents significant issues affecting the personal rights and liberties of all in the nation.

The petition for a writ of certiorari should be granted.

Dated, September 15, 1958.

Respectfully submitted,

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